

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 7073      PCB PIE 18-04      Government Integrity

**SPONSOR(S):** Government Accountability Committee, Appropriations Committee, Public Integrity & Ethics Committee, Metz

**TIED BILLS:**                      **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Public Integrity & Ethics Committee	16 Y, 0 N	Kiner	Rubottom
1) Appropriations Committee	24 Y, 0 N, As CS	Delaney	Leznoff
2) Government Accountability Committee	21 Y, 0 N, As CS	Moore	Williamson

### SUMMARY ANALYSIS

The bill includes various provisions designed to promote integrity in government and identify and eliminate fraud, waste, abuse, mismanagement, and misconduct in government. Specifically, the bill:

- Creates the Florida Accountability Office under the Auditor General for the purpose of ensuring accountability and integrity in state and local government and facilitating the elimination of fraud, waste, abuse, mismanagement, and misconduct in government.
- Requires the Chief Inspector General (CIG) and agency inspectors general to determine whether there is reasonable probability that fraud, waste, abuse, mismanagement, or misconduct in government has occurred within six months of initiating an investigation of such activity.
- Provides a mechanism for the state to recover funds when the CIG or an agency inspector general determines a public official, independent contractor, or agency has committed fraud, waste, abuse, mismanagement, or misconduct in government.
- Requires the Chief Financial Officer to regularly forward to the Florida Accountability Officer copies of suggestions and information submitted through the state's "Get Lean" hotline,.
- Provides a financial incentive for agency employees to file Whistle-blower's Act complaints and participate in investigations that lead to the recovery of funds.
- Requires a claim for legal fees to be paid in whole or in part by any state or local agency to be documented by a description with reasonable particularity of the services provided;
- For agency contracts over \$50,000, requires a contractor to include in the contract a good faith estimate of gross profit for each year of the contract, provides a process for the agency to review such estimate, and provides financial penalties for a contractor who misrepresents the estimate.
- Prohibits state or local tax incentive funds from being used to award or pay a state contractor for services provided or expenditures incurred pursuant to a state contract.
- Requires school districts that receive annual federal, state, and local funds in excess of \$500 million to employ an internal auditor and provided duties for such auditor.
- Broadens the competitive solicitation exemption for statewide broadcasting of public service announcements.
- Prohibits a state employee, other than an agency head, from lobbying for funding for a contract or participating in the award of the contract.

The bill has a projected fiscal impact to the state of approximately \$1.8 million annually to fund the salaries, benefits, and expected expenses to implement the provisions of the bill. However, no appropriation is necessary as the bill authorizes the Auditor General to use carryforward funds, which are sufficient to cover such costs for more than three years. See Fiscal Comments section.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h7073c.GAC

**DATE:** 2/22/2018

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Florida Accountability Office (Sections 1 and 11)**

###### *Current Situation*

The position of Auditor General is established by Art. III, s. 2 of the State Constitution. The Auditor General is appointed to office to serve at the pleasure of the Legislature, by a majority vote of the members of the Legislative Auditing Committee, subject to confirmation by both houses of the Legislature.<sup>1</sup> The appointment of the Auditor General may be terminated at any time by a majority vote of both houses of the Legislature.<sup>2</sup>

The Auditor General conducts audits, examinations, and reviews of government programs as well as audits the accounts and records of state agencies, state universities, state colleges, district school boards, and others as directed by the Legislative Auditing Committee. The Auditor General conducts operational and performance audits on public records and information technology systems and reviews all audit reports of local governmental entities, charter schools, and charter technical career centers.

Current law authorizes the Legislature, through its committees, to inspect and investigate the books, records, papers, documents, data, operation, and physical plant of any public agency in the state, including any confidential information. Current law also authorizes the Legislature, through its committees, to compel by subpoena duces tecum the production of any books, letters, or other documentary evidence, including any confidential information in reference to any matter under investigation.

The United States Government Accountability Office's (GAO) "Standards for Internal Control in the Federal Government" (Green Book) provides "a framework for establishing and maintaining an effective internal control system" within federal government agencies.<sup>3</sup> Among other things, the Green Book provides standard definitions for "fraud," "waste," and "abuse."<sup>4</sup>

The Florida Department of Management Services (DMS) has promulgated Rule 60L-36.005, F.A.C., which sets forth the minimum standards of conduct that apply to all employees in the State Personnel System and the violation of which may result in dismissal.<sup>5</sup>

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<sup>1</sup> Section 11.42(2), F.S.

<sup>2</sup> Section 11.42(5), F.S.

<sup>3</sup> See GAO, *Standards for Internal Control in the Federal Government* (September 2014).

<sup>4</sup> *Id* at pg. 40.

<sup>5</sup> Rule 60L-36.005(1), F.A.C.

## *Effect of Proposed Changes*

The bill codifies definitions for “fraud,”<sup>6</sup> “waste,”<sup>7</sup> “abuse,”<sup>8</sup> and “misconduct.”<sup>9</sup> The definitions for “fraud,” “waste,” and “abuse” mirror the definitions used by GAO, as provided in the Green Book. The definition for “misconduct” mirrors the definition promulgated by DMS in Rule 60L-36.005, F.A.C.

The bill creates the Florida Accountability Office under the Auditor General. The Florida Accountability Office will be led by the Florida Accountability Officer, who is appointed by and will serve at the pleasure of the Auditor General. Pursuant to the bill’s provisions, the Florida Accountability Officer may receive and investigate any complaint alleging fraud, waste, abuse, mismanagement, or misconduct in connection with the expenditure of public funds. The following individuals may submit a complaint: the President of the Senate; the Speaker of the House of Representatives; the chair of an appropriations committee of the Senate or House; and the Auditor General.

Upon receipt of a valid complaint, the bill requires the Florida Accountability Officer to determine whether the complaint is supported by sufficient information indicating a reasonable probability of fraud, waste, abuse, mismanagement, or misconduct. If the Florida Accountability Officer determines that the complaint is not supported by sufficient information indicating a reasonable probability of fraud, waste, abuse, mismanagement, or misconduct, the Florida Accountability Officer must notify the complainant in writing, and the complaint must be closed.

If the complaint is supported by sufficient information indicating a reasonable probability of fraud, waste, abuse, mismanagement, or misconduct, the bill requires the Florida Accountability Officer to determine whether the matter is under investigation by a law enforcement agency, the Commission on Ethics, the Chief Financial Officer, the Office of the Chief Inspector General, or the applicable agency inspector general. If such an investigation has been initiated, the Florida Accountability Officer must notify the complainant in writing, and the complaint may be closed. If such an investigation has not been initiated, the bill requires the Florida Accountability Officer to conduct an investigation and issue a report of the investigative findings to the President of the Senate and the Speaker of the House. The Florida Accountability Officer may also refer the matter to the Auditor General, the appropriate law enforcement agency, the Commission on Ethics, the Chief Financial Officer, the Office of the Chief Inspector General, or the applicable agency inspector general.

Similar to the current general law authority given to each house of the Legislature through its respective committee,<sup>10</sup> the bill gives the Florida Accountability Officer the authority to investigate the books, records, papers, documents, data, operation, and physical location of any public agency in the state, including any confidential information, and the public records of any entity that has received public funds.

The bill also authorizes the Florida Accountability Officer to request the Legislative Auditing Committee or any standing committee to exercise their existing powers<sup>11</sup> to issue subpoenas and subpoenas duces tecum to compel testimony or the production of evidence when deemed necessary to an

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<sup>6</sup> The bill defines the term “fraud” to mean “obtaining something of value through willful misrepresentation, including, but not limited to, the intentional misstatements or intentional omissions of amounts or disclosures in financial statements to deceive users of financial statements, theft of an organization’s assets, bribery, or the use of one’s position for personal enrichment through the deliberate misuse or misapplication of an organization’s resources.”

<sup>7</sup> The bill defines the term “waste” to mean “the act of using or expending resources unreasonably, carelessly, extravagantly, or for no useful purpose.”

<sup>8</sup> The bill defines the term “abuse” to mean “behavior that is deficient or improper when compared with behavior that a prudent person would consider a reasonable and necessary operational practice given the facts and circumstances.” The term includes the misuse of authority or position for personal gain.

<sup>9</sup> The bill defines the term “misconduct” to mean “conduct which, though not illegal, is inappropriate for a person in his or her specified position.”

<sup>10</sup> See Section 11.143(2), F.S.

<sup>11</sup> *Id.*

authorized investigation. The bill also provides the means of enforcing any subpoena issued pursuant to the bill's provisions.

Beginning with the 2019-2020 fiscal year, the bill requires the Auditor General and Florida Accountability Officer to, within available resources, randomly select and review appropriations projects appropriated in the prior fiscal year and, if appropriate, investigate and recommend an audit of such project. The bill requires that, at a minimum, the investigation or audit must include an evaluation of whether the recipient of the appropriations project administered the project in an efficient and effective manner. Pursuant to the bill, the term, "appropriations project" means a specific appropriation or proviso providing funding for a specified entity that is a local government, private entity, or privately-operated program that is named or described. The term does not include an appropriation:

- Specifically authorized by statute;
- That is part of a statewide distribution to local governments;
- Recommended by a commission, council, or other similar entity created in statute to make annual funding recommendations, provided that such appropriation does not exceed the amount of funding recommended by the commission, council, or other similar entity;
- For a specific transportation facility that was part of the Department of Transportation's five-year work program submitted pursuant to s. 339.135, F.S.;
- For an education fixed capital outlay project that was submitted pursuant to s. 1013.60, F.S., or s. 1013.64, F.S.; or
- For a specified program, research initiative, institute, center, or similar entity at a specific state college or university recommended by the Board of Governors or the State Board of Education in its Legislative Budget Request.

The bill's definition of "appropriations project" mirrors the definition of the term in current Senate and House Joint Rule 2.2, adopted for the 2016 – 2018 biennium.

Beginning with the 2019-2020 fiscal year, the bill requires the Auditor General and the Florida Accountability Officer, within available resources, to select and review, audit, or investigate the financial activities of:

- Political subdivisions, special districts, public authorities, public hospitals, state and local councils or commissions, units of local government, or public education entities in the state; and
- Any authorities, councils, commissions, direct-support organizations, institutions, foundations, or similar entities created by law or ordinance to pursue a public purpose, entitled by law or ordinance to any distribution of tax or fee revenues, or organized for the sole purpose of supporting one of the public entities listed above.

To fund the establishment and operations of the Florida Accountability Office, the bill authorizes the Office of Auditor General to use carryforward funds.

### **Inspectors General (Sections 2 and 5)**

#### *Current Situation*

The Office of Chief Inspector General (CIG) is responsible for promoting accountability, integrity, and efficiency in agencies under the Governor's jurisdiction.<sup>12</sup> The CIG monitors the activities of the agency inspectors general under the Governor's jurisdiction and is required to do the following:

- Initiate, supervise, and coordinate investigations, recommend policies, and carry out other activities designed to deter, detect, prevent, and eradicate fraud, waste, abuse, mismanagement, and misconduct in government;

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<sup>12</sup> Section 14.32(1), F.S.  
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- Investigate, upon receipt of a complaint or for cause, any administrative action of any agency the administration of which is under the direct supervision of the Governor;
- Request such assistance and information as may be necessary for the performance of the CIG's duties;
- Examine the records and reports of any agency the administration of which is under the direct supervision of the Governor;
- Coordinate complaint-handling activities with agencies;
- Coordinate the activities of the Whistle-blower's Act and maintain the whistle-blower's hotline to receive complaints and information concerning the possible violation of law or administrative rules, mismanagement, fraud, waste, abuse of authority, malfeasance, or a substantial or specific danger to the health, welfare, or safety of the public;
- Report expeditiously to and cooperate fully with the Department of Law Enforcement, the Department of Legal Affairs, and other law enforcement agencies when there are recognizable grounds to believe that there has been a violation of criminal law or that a civil action should be initiated;
- Act as liaison with outside agencies and the federal government to promote accountability, integrity, and efficiency in state government;
- Act as liaison and monitor the activities of the inspectors general in the agencies under the Governor's jurisdiction;
- Review, evaluate, and monitor the policies, practices, and operations of the Executive Office of the Governor; and
- Conduct special investigations and management reviews at the request of the Governor.<sup>13</sup>

Authorized under s. 20.055, F.S., an Office of Inspector General (OIG) is established in each state agency<sup>14</sup> to provide a central point for the coordination and responsibility for activities that promote accountability, integrity, and efficiency in government. Each agency OIG is responsible for the following:

- Advising in the development of performance measures, standards, and procedures for the evaluation of state agency programs;
- Assessing the reliability and validity of information provided by the agency on performance measures and standards;
- Reviewing the actions taken by the agency to improve agency performance, and making recommendations, if necessary;
- Supervising and coordinating audits, investigations, and reviews relating to the programs and operations of the state agency;
- Conducting, supervising, or coordinating other activities carried out or financed by the agency for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;
- Providing central coordination of efforts to identify and remedy waste, abuse, and deficiencies to the agency head,<sup>15</sup> or the CIG for agencies under the jurisdiction of the Governor; recommending corrective action concerning fraud, abuses, and deficiencies; and reporting on the progress made in implementing corrective action;

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<sup>13</sup> Section 14.32(2), F.S.

<sup>14</sup> Section 20.055(1)(d), F.S., defines the term "state agency" as each department created pursuant to ch. 20, F.S., and also includes the Executive Office of the Governor, the Department of Military Affairs, the Fish and Wildlife Conservation Commission, the Office of Insurance Regulation of the Financial Services Commission, the Office of Financial Regulation of the Financial Services Commission, the Public Service Commission, the Board of Governors of the State University System, the Florida Housing Finance Corporation, the Agency for State Technology, the Office of Early Learning, and the state courts system.

<sup>15</sup> Section 20.055(1)(a), F.S., defines the term "agency head" as the Governor, a Cabinet officer, a secretary as defined in s. 20.03(5), F.S., or an executive director as defined in s. 20.03(6), F.S. It also includes the chair of the Public Service Commission, the Director of the Office of Insurance Regulation of the Financial Services Commission, the Director of the Office of Financial Regulation of the Financial Services Commission, the board of directors of the Florida Housing Finance Corporation, the executive director of the Office of Early Learning, and the Chief Justice of the State Supreme Court.

- Coordinating agency-specific audit activities between the Auditor General, federal auditors, and other governmental bodies to avoid duplication;
- Reviewing rules relating to the programs and operations of the agency and making recommendations concerning their impact;
- Ensuring that an appropriate balance is maintained between audit, investigative, and other accountability activities; and
- Complying with the General Principles and Standards for Offices of Inspector General as published and revised by the Association of Inspectors General.<sup>16</sup>

With respect to investigations, each OIG must initiate, conduct, supervise, and coordinate investigations designed to detect, deter, prevent, and eradicate fraud, waste, mismanagement, misconduct, and other abuses in state government. For these purposes, each inspector general must do the following:

- Receive complaints and coordinate all activities of the agency as required by the Whistle-blower's Act;
- Receive and consider the complaints that do not meet the criteria for an investigation under the Whistle-blower's Act and conduct, supervise, or coordinate such inquiries, investigations, or reviews as the inspector general deems appropriate;
- Report expeditiously to the Department of Law Enforcement or other law enforcement agencies, as appropriate, when the inspector general has reasonable grounds to believe there has been a violation of criminal law;
- Conduct investigations and other inquiries free of actual or perceived impairment to the independence of the inspector general or the inspector general's office. This must include freedom from any interference with investigations and timely access to records and other sources of information;
- At the conclusion of an investigation, the subject of which is an entity contracting with the state or an individual substantially affected, submit the findings to the contracting entity or the individual substantially affected, who must be advised that they may submit a written response to the findings. The response and the inspector general's rebuttal to the response, if any, must be included in the final audit report; and
- Submit in a timely fashion final reports on investigations conducted by the inspector general to the agency head.<sup>17</sup>

### *Effect of Proposed Changes*

The bill requires the CIG and agency inspectors general to make a reasonable probability determination within six months of initiating an investigation of fraud, waste, abuse, mismanagement, or misconduct in government. Pursuant to the bill's provisions, if the investigation continues in the absence of reasonable probability that fraud, waste, abuse, mismanagement, or misconduct has occurred, the CIG or any agency inspector general must make a new determination every three months until the investigation is closed or reasonable probability is found. The bill provides definitions for the terms "fraud,"<sup>18</sup> "waste,"<sup>19</sup> "abuse,"<sup>20</sup> and "misconduct."<sup>21</sup>

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<sup>16</sup> Section 20.055(2), F.S.

<sup>17</sup> Section 20.055(7), F.S.

<sup>18</sup> The bill defines the term "fraud" to mean "obtaining something of value through willful misrepresentation, including, but not limited to, the intentional misstatements or intentional omissions of amounts or disclosures in financial statements to deceive users of financial statements, theft of an organization's assets, bribery, or the use of one's position for personal enrichment through the deliberate misuse or misapplication of an organization's resources."

<sup>19</sup> The bill defines the term "waste" to mean "the act of using or expending resources unreasonably, carelessly, extravagantly, or for no useful purpose."

<sup>20</sup> The bill defines the term "abuse" to mean "behavior that is deficient or improper when compared with behavior that a prudent person would consider a reasonable and necessary operational practice given the facts and circumstances." The term includes the misuse of authority or position for personal gain.

If the CIG or an agency inspector general determines that there is reasonable probability to believe a public official, independent contractor, or agency has committed fraud, waste, abuse, mismanagement, or misconduct in government, the bill requires the applicable inspector general to report such findings to the Florida Accountability Officer and to the Commission on Ethics, the Office of Fiscal Integrity within the Chief Financial Officer's (CFO's) office, or proper law enforcement agency if such entity has jurisdiction over the subject matter. Pursuant to the bill, such public officer, independent contractor, or agency employee responsible for the fraud, waste, abuse, mismanagement, or misconduct in government is liable for repayment of the funds diverted or lost. If the person liable fails to repay such funds voluntarily and the state does not agree to a settlement, the bill requires the CFO to bring a civil action to recover the funds.

### **Chief Financial Officer (Section 3)**

#### *Current Situation*

The CFO is an elected constitutional Cabinet member.<sup>22</sup> The CFO serves as the chief fiscal officer of the state and is responsible for settling and approving accounts against the state and keeping all state funds and securities.<sup>23</sup> Such responsibilities include, but are not limited to, auditing and adjusting accounts of officers and those indebted to the state,<sup>24</sup> paying state employee salaries,<sup>25</sup> and reporting all disbursements of funds administered by the CFO.<sup>26</sup>

The CFO's Office of Fiscal Integrity's (OFI) mission is to detect and investigate the misappropriation or misuse of state assets in a manner that safeguards the interests of the state and its taxpayers. OFI is a criminal justice agency<sup>27</sup> with full statutory subpoena power.<sup>28</sup>

According to OFI, OFI conducts criminal investigations into misbehavior by state employees that have been under review by their respective agency inspector general. Upon receiving the referral on the state employee, OFI may begin a full criminal investigation. If criminal charges are warranted, OFI will refer the matter to the proper charging authority.

According to OFI, OFI does not currently have the authority to commence an investigation based on a complaint from an employee of a state agency or state contractor.

#### *Effect of Proposed Changes*

The bill authorizes the CFO to commence an investigation based on a complaint or referral from any source, including an employee of a state agency or state contractor. The bill also explicitly authorizes an employee of a state agency or state contractor who has knowledge of suspected misuse of state funds to report such information to the CFO.

### **"Get Lean" Hotline (Section 4)**

#### *Current Situation*

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<sup>21</sup> The bill defines the term "misconduct" to mean "conduct which, though not illegal, is inappropriate for a person in his or her specified position."

<sup>22</sup> FLA. CONST. art. IV, s. 4,

<sup>23</sup> FLA. CONST. art. IV, s. 4(c); s. 17.001, F.S.

<sup>24</sup> Section 17.04, F.S.

<sup>25</sup> Section 17.09, F.S.

<sup>26</sup> Section 17.11, F.S.

<sup>27</sup> Section 20.121(2)(e), F.S.

<sup>28</sup> Section 17.05(2), F.S.

Florida law requires the CFO to operate a 24-hour statewide toll-free telephone hotline to receive information or suggestions from state residents on how to improve the operation of government, increase governmental efficiency, and eliminate waste in government.<sup>29</sup> The CFO is required to advertise the hotline by posting notices in conspicuous places in state agency offices, city halls, county courthouses, and places in which there is exposure to significant numbers of the general public, including, but not limited to, local convenience stores, shopping malls, shopping centers, gas stations, or restaurants.<sup>30</sup> Additionally, the law allows the CFO to advertise the availability of the hotline in newspapers of general circulation within the state.<sup>31</sup> When advertising the hotline, the CFO is required to use the slogan, "Tell us where we can 'Get Lean.'"<sup>32</sup>

Those that call the hotline may remain anonymous, but if the caller provides his or her name, the name is kept confidential.<sup>33</sup> By law, the caller is immune from liability for any use of the information and may not be subject to any retaliation by any state employee for making the call.<sup>34</sup>

When a call comes in to the hotline, the CFO's office is required to conduct an evaluation to determine if the call is appropriate to be processed as a "Get Lean" telephone call.<sup>35</sup> If the call is appropriate to be processed as a "Get Lean" telephone call, the CFO's office is required to keep a record of each suggestion or item of information received in the call.<sup>36</sup>

If the caller discloses that he or she is a state employee, the CFO's office may refer any information or suggestion from the caller to an existing state awards program administered by the impacted agency.<sup>37</sup> If forwarded a suggestion or information from the CFO's office, the impacted agency is required to conduct a preliminary evaluation of the efficacy of the suggestion or information and provide the CFO's office with a preliminary determination of the amount of revenue the state might save by implementing the suggestion or making use of the information.<sup>38</sup>

Based on information provided by the CFO's office, from January 1, 2016, through September 30, 2017, there were 108 suggestions or items of information received through the hotline. Of these, 66 were processed as "Get Lean" telephone calls.

### *Effect of Proposed Changes*

The bill requires the CFO's office to provide a copy of each suggestion or item of information recorded as a "Get Lean" telephone call to the Florida Accountability Officer by the 15th of the month following receipt of the suggestion or item of information.

## **Savings Sharing Program (Section 6)**

### *Current Situation*

Florida law provides a state "Savings Sharing Program" for the purpose of providing a process by which state agencies can retain a portion of their budget for implementing internally generated program efficiencies and cost reductions and then redirect the savings to employees. By law, DMS is required to adopt rules that prescribe procedures for the program.<sup>39</sup>

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<sup>29</sup> Section 17.325(1), F.S.

<sup>30</sup> Section 17.325(2), F.S.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Section 17.325(4), F.S.

<sup>35</sup> Section 17.325(3), F.S.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Section 110.1245(1)(a), F.S.

Each state agency is eligible to participate in the “Savings Sharing Program” and each agency head is responsible for recommending employees individually or by group to be awarded an amount of money, which must be directly related to the cost savings realized.<sup>40</sup> All employees within the Career Service and Selected Exempt Service are eligible to receive awards, provided they meet the statutory eligibility criteria.<sup>41</sup>

Additionally, the law allows the Chief Justice to establish a savings sharing program for comparable employees in the judicial branch.<sup>42</sup>

Each proposed award and amount of money must be approved by the Legislative Budget Commission before distribution.<sup>43</sup>

### *Effect of Proposed Changes*

The bill creates a reward system for state employees whose report under the Whistle-blower’s Act results in savings or recovery of public funds in excess of \$1,000. The amount of the award will be determined by the amount recovered, the employee’s employment classification, and when more than one employee makes a relevant report, in proportion to each employee’s contribution to the investigation that led to the recovery of such funds. The bill sets the following award amounts:

- Career Service Employee – 10 percent of savings or recovery certified, but not less than \$500 and not more than a total of \$50,000 in any year.
- Selected Exempt Service Employees and Senior Management Service – 5 percent of savings or recovery certified, but not more than \$1,000 in any year.

The bill requires the award to be paid from the specific appropriation or trust fund from which the savings or recovery resulted.

The bill provides that these awards are not bonuses and do not require approval by the Legislative Budget Commission.

## **Whistle-blower’s Act (Sections 7 through 10)**

### *Current Situation*

Florida’s Whistle-blower’s Act protects government employees from adverse actions from their employers or an independent contractor for reporting any act (or suspected act) of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty; or any violation (or suspected violation) of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency or independent contractor that creates and presents a substantial and specific danger to the public’s health, safety, or welfare.<sup>44</sup> Florida’s Whistle-blower’s Act, codified in ss. 112.3187 – 112.31895, F.S., governs the complaint filing and resolution process, provides investigatory procedures upon receipt of a complaint and in response to prohibited personnel actions, as well as provides for confidentiality of the complainant’s name or identity.

### *Effect of Proposed Changes*

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<sup>40</sup> Section 110.1245(1)(b), (c), F.S.

<sup>41</sup> Section 110.1245(1)(c) and (2)(b), F.S.

<sup>42</sup> *Id.*

<sup>43</sup> Section 110.1245(1)(b), F.S.

<sup>44</sup> Section 112.3187(4), (5), F.S.

The bill provides a definition for “mismanagement” and defines it to mean “a continuous or repeated pattern of neglect of managerial duty, managerial abuses, wrongful or arbitrary and capricious actions, or deceptive, fraudulent, or criminal conduct which may have a substantial adverse economic impact.” The bill also broadens the category of complaints that may be covered by the Whistle-blower’s Act. Specifically, the bill covers complaints alleging “mismanagement,” “waste of public funds,” and “neglect of duty” as opposed to “gross mismanagement,” “gross waste of public funds,” and “gross neglect of duty” as under current law. The bill makes conforming changes to other portions of the Whistle-blower’s Act consistent with the revised definitions and broader category of complaints.

## **Legal Services (Section 11)**

### *Current Situation*

Chapter 286, F.S., includes various provisions relating to conducting public business, such as public meeting requirements, powers of certain constitutionally created commissions, and limitations on the use of public funds.

The term “block billing” refers to the practice of combining more than one task into a single entry of time and then billing one’s client for such time. Without a request for further detail, block billing makes it very difficult to determine how much time was devoted to each task.

### *Effect of Proposed Changes*

Notwithstanding any other law, the bill requires a claim for legal services under any provision of law to be compensated, credited, or approved in whole or in part by any state or local agency to be documented with reasonable particularity of the services provided, including, for each date services were rendered, an itemization of each task performed and the time expended on each task.

## **Procurement of Commodities and Services (Section 12)**

### *Current Situation*

Chapter 287, F.S., regulates state agency<sup>45</sup> procurement of personal property and services. DMS is responsible for overseeing state purchasing activity, including professional and construction services, as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.<sup>46</sup> DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state’s buying power.<sup>47</sup>

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:<sup>48</sup>

- Invitations to bid – used when the agency is capable of specifically defining the scope of work for which a contractual service is required or when the agency is capable of establishing precise specifications defining the actual commodity or group of commodities required. In such cases, the contract is awarded to the responsible and responsive vendor who submits the lowest responsive bid;
- Requests for proposal – used when the purposes and uses for which the commodity, group of commodities, or contractual service being sought can be specifically defined and the agency is

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<sup>45</sup> Section 287.012(1), F.S., defines the term “agency” as “any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. ‘Agency’ does not include the university and college boards of trustees or the state universities and colleges.”

<sup>46</sup> See ss. 287.032 and 287.042, F.S.

<sup>47</sup> *Id.*

<sup>48</sup> See ss. 287.012(6) and 287.057, F.S.

capable of identifying necessary deliverables. Various combinations or versions of commodities or contractual services may be proposed by a responsive vendor to meet the specifications of the solicitation document. In such cases, the contract is awarded to the responsible and responsive vendor whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and other criteria set forth in the request for proposals;

- Invitations to negotiate – used when the agency intends to determine the best method for achieving a specific goal or solving a particular problem and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value; and
- Single source contracts – used when the agency determines that only one vendor is available to provide a commodity or service at the time of purchase.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process;<sup>49</sup> however, certain contractual services and commodities are exempt from this requirement,<sup>50</sup> or state or federal law may prescribe with whom the agency must contract,<sup>51</sup> or the rate of payment or the recipient of the fund may be established during the appropriations process.<sup>52</sup>

Current law contains an exemption from the competitive solicitation requirement for statewide public service announcement programs provided by a Florida statewide nonprofit corporation under s. 501(c)(6) of the Internal Revenue Code that have a guaranteed documented match of at least \$3 to \$1.<sup>53</sup>

#### *Effect of Proposed Changes*

The bill expands the current law competitive solicitation exemption for statewide public service announcements. Pursuant to the bill's provisions, the exemption will no longer require the public service announcement to be statewide, and will no longer require that it be provided by a 501(c)(6) corporation.

The bill sets new requirements for contracts in excess of \$50,000 awarded through the following processes:

- Invitation to negotiate;
- Single-source;
- Competitive solicitation exemption;
- State or federally mandated contracts; and
- Where appropriations process prescribes rate of payment or recipient of funds.

For these contracts in excess of \$50,000, the bill requires the contractor to include a good faith estimate of gross profit<sup>54</sup> for each year of the contract. If the contractor includes the cost of products or services expected to be provided by a participant<sup>55</sup> closely associated with the contractor,<sup>56</sup> the

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<sup>49</sup> Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

<sup>50</sup> See s. 287.057(3), F.S.

<sup>51</sup> See s. 287.057(10), F.S.

<sup>52</sup> *Id.*

<sup>53</sup> See s. 287.057(3)(e)13., F.S.

<sup>54</sup> Pursuant to the bill, the phrase "good faith estimate of gross profit" means a good faith estimate of the total receipts expected under the contract less the cost of providing contracted commodities and services under the contract, not including overhead costs. "Overhead costs" means all costs not directly related to contract performance, including, but not limited to, marketing and administrative expenses.

<sup>55</sup> Pursuant to the bill, the term "participant" means a person or entity with whom the contractor expects to subcontract for services or commodities in carrying out a contract with an agency.

<sup>56</sup> Pursuant to the bill, the phrase "closely associated with the contractor" means the contractor, a principal of the contractor, or a family member or business associate of a principal of the contractor is a principal of the participant. "Principal" means a person who

contractor must name the participant, describe the association, and must provide a good faith estimate of gross profit for the participant for each year of the contract. Before awarding the contract, the agency must make a written determination that such estimated gross profit is not excessive and specify the reasons for such determination. If a contractor misrepresents the gross profit estimate, the contractor will be liable to the agency for three times the amount or value of the misrepresentation.

The effect of the proposed change will allow the agency, the Legislature, and the public to determine better the reasonable value of non-competitive procurements.

The bill also prohibits a state employee from lobbying for funding for a contract and also participating in the awarding of such contract. This provision of the bill does not apply to an agency head.

### **Tax Incentives (Section 13)**

#### *Current Situation*

Chapter 288, F.S., governs the operation of numerous economic development programs, some of which provide tax credits, tax refunds, sales tax exemptions, cash grants, and other similar programs.

#### *Effect of Proposed Changes*

Notwithstanding any other law, the bill prohibits a tax incentive from being awarded or paid to a state contractor or any subcontractor for services provided or expenditures incurred pursuant to a state contract.

### **District School Boards (Section 14)**

#### *Current Situation*

An internal audit is an independent and objective assurance and consulting activity that provides information on how financial systems and processes are working. Internal audits result in findings and recommendations that help improve processes and mitigate risks surrounding those processes. An internal audit is different from an external audit, which expresses an opinion on the reasonableness of financial statements within materiality limits. Internal audits focus on processes to determine if they are compliant, effective, and efficient.<sup>57</sup>

Currently, district school boards are permitted, but not required, to employ an internal auditor to perform ongoing financial verification of the financial records of the school district. The internal auditor reports directly to the district school board or its designee.<sup>58</sup>

Bay, Brevard, Broward, Clay, Duval, Escambia, Hillsborough, Lake, Lee, Leon, Marion, Martin, Miami Dade, Orange, Palm Beach, Pasco, Pinellas, and Polk County district school boards employ internal auditors. However, according to the Office of the Auditor General, the internal auditors in Bay, Clay, Lee, and Marion counties only perform audits of school internal funds and are not required to comply with externally established auditing standards.<sup>59</sup>

On February 2, 2014, as part of its presentation to the Joint Legislative Auditing Committee, the Office of the Auditor General recommended that school districts of a specified size employ internal auditors to

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owns at least 5 percent interest in the business or entity or is a manager of the business or entity. "Business associate" means a person or entity with whom a principal of the contractor has substantial investment, employment, or partnership interests.

<sup>57</sup> Gibson Consulting Group, *Phase II: Operational Efficiency Audit – Comprehensive Report for Hillsborough County Public Schools*, available at [http://www.sdhc.k12.fl.us/docs/00/00/17/86/HCPGibsonPhaseIIFinal\\_Report.pdf](http://www.sdhc.k12.fl.us/docs/00/00/17/86/HCPGibsonPhaseIIFinal_Report.pdf).

<sup>58</sup> Section 1001.42(12)(l), F.S.

<sup>59</sup> Email, Auditor General, Deputy Auditor General – Educational Entities and Local Government Audits, (Oct. 26, 2017).

periodically report on the effectiveness of budgetary control procedures. The Office of the Auditor General also recommended laws requiring internal controls designed to:

- Prevent and detect fraud, waste, and abuse;
- Promote and encourage economic and efficient operations;
- Ensure the reliability of financial records and reports; and
- Safeguard assets.<sup>60</sup>

### *Effect of Proposed Changes*

The bill requires school districts receiving annual federal, state, and local funds in excess of \$500 million to employ an internal auditor. The scope of the internal auditor may not be restricted and must include every functional and program area of the school system. The internal auditor must perform a comprehensive risk assessment every five years and conduct other audits and reviews as the district school board directs to determine:

- The adequacy of internal controls designed to prevent fraud, waste, and abuse;
- Compliance with applicable laws, rules, contracts, grant agreements, district school board-approved policies, and best practices;
- The efficiency of operations;
- The reliability of financial records and reports;
- Financial solvency;
- Projected revenues and expenditures; and
- The rate of change in the general fund balance.

The bill also requires the internal auditor to prepare audit reports and establishes penalties for failure to produce financial records to the internal auditor.<sup>61</sup>

### B. SECTION DIRECTORY:

Section 1 creates s. 11.421, F.S., to establish a Florida Accountability Office within the Office of Auditor General.

Section 2 amends s. 14.32, F.S., relating to the Office of CIG.

Section 3 amends s. 17.04, F.S., relating to auditing and adjusting accounts of officers and those indebted to the state.

Section 4 amends s. 17.325, F.S., relating to Florida's 'Get Lean' hotline established and operated by the CFO.

Section 5 amends s. 20.055, F.S., relating to agency inspectors general.

Section 6 amends s. 110.1245, F.S., relating to the state "Savings Sharing Program."

Section 7 amends s. 112.3187, F.S., relating to the Whistle-blower's Act.

Section 8 amends s. 112.3188, F.S., conforming provisions to changes made by the act.

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<sup>60</sup> Joint Legislative Auditing Committee, *Meeting Packet, February 10, 2014*, at 110 and 114, available at <http://www.leg.state.fl.us/Data/Committees/Joint/JCLA/Meetingpackets/021014.pdf>.

<sup>61</sup> Section 11.47(3), F.S., provides that any person who willfully fails or refuses to furnish or produce any book, record, paper, document, data, or sufficient information necessary to a proper audit or examination which the Auditor General or the Office of Program Policy Analysis and Government Accountability is by law authorized to perform is guilty of a misdemeanor of the first degree. Section 11.47(4), F.S., provides that any officer who willfully fails or refuses to furnish or produce any book, record, paper, document, data, or sufficient information necessary to a proper audit or examination that the Auditor General or the Office of Program Policy Analysis and Government Accountability is by law authorized to perform, is subject to removal from office.

Section 9 amends s. 112.3189, F.S., conforming provisions to changes made by the act.

Section 10 amends s. 112.31895, F.S., conforming provisions to changes made by the act.

Section 11 creates s. 286.31, F.S., relating to use of state or local funds to pay legal fees.

Section 12 amends s. 287.057, F.S., relating to the procurement of commodities or contractual services.

Section 13 creates s. 288.00001, F.S., relating to use of state or local incentive funds to pay for services.

Section 14 amends s. 1001.42, F.S., relating to powers and duties of district school boards.

Section 15 provides authority to the Auditor General to use carryforward funds to fund the establishment and operation of the Florida Accountability Office.

Section 16 provides an effective date of July 1, 2018.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

See Fiscal Comments.

#### **2. Expenditures:**

See Fiscal Comments.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

See Fiscal Comments.

#### **2. Expenditures:**

See Fiscal Comments.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

Staff in the Office of Auditor General projected a potential annual fiscal impact of approximately \$1.8 million to staff (11 FTEs) to staff and fund the newly created Florida Accountability Office. The entire amount would not be necessary in Fiscal Year 2018-19 as the staff and expense would be added and incurred incrementally as the Office is established and gets up and running. No appropriation is necessary as the Auditor General has sufficient carryforward funds to cover the costs for more than three years.

The revisions to the state "Savings Sharing Program" will likely have an indeterminate positive fiscal impact on agencies as they provide an incentive for agency employees to file Whistle-blower's Act complaints and participate in investigations that lead to the recovery of state or federal funds. Any award given pursuant to this provision will be paid from the specific appropriation or trust fund from which the savings or recovery resulted.

The bill may have an indeterminate negative fiscal impact on district school boards that receive more than \$500 million in annual federal, state, and local funds because such school boards will be required to employ an internal auditor.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

None.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 14, 2018, the Appropriations Committee adopted an amendment that removed a \$3 million appropriation from the General Appropriation Fund and replaced it with language authorizing the Auditor General to use carryforward funds to fund the establishment and operations of the Florida Accountability Office as created by this act.

On February 22, 2018, the Government Accountability Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Revised the Florida Accountability Officer's duties with respect to appropriations projects;
- Added a requirement that the Florida Accountability Officer inspect, audit, or investigate the financial activities of local government and other public entities, as well as the direct-support organizations supporting them;
- Authorized the CFO to commence a fraud investigation based on a complaint from any employee of a state agency or state contractor;
- Required a claim for legal fees to be paid in whole or in part by any state or local agency to be documented by a description with reasonable particularity of the services provided;
- Required an agency to make a written determination that a contractor's estimate of gross profit is not excessive with respect to certain contracts;
- Prohibited state or local tax incentive funds from being used to award or pay a state contractor for services provided or expenditures incurred pursuant to a state contract;
- Required school districts that receive annual federal, state, and local funds in excess of \$500 million to employ an internal auditor and provided duties for such auditor;
- Provided that any school board member may request and receive any proposed, tentative, or official budget documents, including all supporting and background information; and
- Removed the label 'gross' from 'gross mismanagement' with respect to investigations conducted by the Florida Accountability Officer, the Office of CIG, or the CFO.

This analysis is drafted to the committee substitute as approved by the Government Accountability Committee.